

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

RECEIVED
MAR 10 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In The Matter Of)

Amendment of Section 73.3598 of)
the Commission's Rules)

MM Docket No. _____

RM No. _____

To: The Commission

PETITION FOR RULEMAKING

Entravision Holdings, LLC ("Entravision") and Paul A. Zevnik, a member of Entravision (collectively, "Petitioners"), by their attorneys and pursuant to Section 1.401 of the Commission's Rules, hereby request that the Commission commence a rulemaking proceeding looking to amend Section 73.3598 of the Commission's Rules so as to permit qualified broadcasters, having significant minority group participation or proposing to meet the broadcasting needs of minority group populations, to obtain a construction permit that would otherwise be declared forfeited and, as a result thereof, receive additional time in which to complete construction. In support thereof, Petitioner states as follows:

INTRODUCTION

Entravision is a group owner of television and radio properties generally serving the Hispanic community. Its ownership includes minority group members and its Chief Executive Officer is himself a Mexican-American. Given the role of minorities in the ownership, management and program service of Entravision, Petitioners have always had a particular concern for the involvement of minority-group members in the mass media industry. While it can and does play a role in hiring and promoting minorities, Entravision alone cannot change the trend it has

No. of Copies rec'd _____
List ABCDE _____

MMB

054

noted of fewer minority owners, executives and programming opportunities.

Petitioners are not alone in this concern over the participation of minorities in an industry that is rapidly consolidating and facing an escalation of property values that is pricing all but the most successful and well-financed parties out of ownership opportunities in broadcast markets of any size. Chairman Kennard, speaking last December to the National Black Media Coalition, showed his own concern over these matters when he said:

Despite what some are characterizing as a lost cause, I want to tell you that we do not believe this is the time to quit--to throw up our hands and say, "Oh well, we tried," and then fade quietly away. Quite the contrary, this is the time to redouble our efforts--to utilize every legal, judicial and legislative measure possible to continue the struggle for equality of opportunity and diversity in our communications industry. It is a time for creativity, earnestness, new approaches and a renewed commitment to do what it takes to continue to create opportunity in the media for minorities and women.

Petitioners await the initiatives that Chairman Kennard has pledged to undertake. It hopes that they will serve to add to the ranks of broadcast owners and executives the "ethnic and gender diversity" that the Chairman noted is so lacking in the media industry. However, with each passing day, the media industry continues to exclude minorities in its headlong rush to concentration and exorbitant property values. Efforts must begin at once to give minorities opportunities before none are left for them.

As the Commission, facing pressure from the Congress and the Courts, has closed opportunities for minorities, Petitioners have been looking for situations where they can be found. Petitioners believe that they have identified one such opportunity and asks that the Commission initiate a rulemaking to enact it for the benefit of minority group members and those who will

serve minority group members.

REQUESTED RULEMAKING

In the proceeding styled 1998 Biennial Regulatory Review--Streamlining of Mass Media Applications, Rules, and Processes, FCC 98-281, released November 25, 1998 (“Streamlining Order”), the Commission modified a variety of its processing rules for broadcast applications involving both new applicants and requests for assignments and transfers of control of existing stations and licensees. Among the revisions contained in the Streamlining Order was a wholesale change in the policies relating to how long a party may hold a construction permit and when it could be extended.

Sections 73.3598 and 73.3534(b) long governed construction permits, the authorizations given by the Commission to broadcasters to construct new stations or modifications to existing facilities. Section 73.3598 provided that television broadcasters had two years in which to construct their facilities, while other broadcasters had 18 months in which to do so. Section 73.3534 established the bases as to when a construction permit, facing expiration, could be extended.

Seeking to end this process and adopt a standardized replacement procedure, the Commission, in the Streamlining Order, changed the entire construction permit scheme. Instead of a two separate time periods, the Commission adopted a single, three-year term for construction permits. Streamlining Order at ¶ 83. In the Commission’s view, this would “substantially reduce paperwork and administrative burdens on permittees and the number of requests for additional time to construct while promoting the expeditious construction of stations.” Id. at ¶ 79.

Consistent with the change in Section 73.3598, the Commission deleted the provisions of

Section 73.3534 dealing with extensions. While extensions were to be permitted, the intent was to limit extension possibilities to only a small number of circumstances. The exceptions to the time limitation rule were to be those cases where “construction is encumbered due to an act of God, or when a construction permit is the subject of administrative or judicial review.”

Streamlining Order at ¶ 84. The clear expectation is that there will be few of these extensions.

Perhaps the most drastic change contained in the Streamlining Order was to apply it retroactively.¹ Thus, all outstanding construction permits face a deadline when they have passed the three-year unencumbered period. While there is no exact figure, Petitioners expect that this change will result in a number of permits being forfeited under the automatic forfeiture provisions of Section 73.3598(e).

Petitioners submit that forfeited construction permits are an ideal opportunity for the Commission to seize upon as a basis for promoting expanded minority ownership. These are permits that would otherwise be terminated and, in some instances, be totally lost.² Petitioners submit that the Commission should permit permittees of new stations, that either have lost or will lose their permits due to the application of the existing Section 73.3534 or the rules adopted under the Streamlining Order, to sell them to a qualified group, who will be able to keep the permit in good standing.

It is proposed that all permittees have a window, commencing 60 days prior to the

¹ Entravision, among others, has filed a Petition for Reconsideration of the Streamlining Order arguing, *inter alia*, that the retroactive effect of this change violates a prohibition on legislative rules being made retroactive.

² This is particularly so in light of the Sixth Report and Order in MM Docket No. 87-268, 12 FCC Rcd 14588 (1997), where the FCC has recaptured the spectrum of deleted stations.

expiration of the permit and ending 30 days after that expiration. During the window, the permittees can enter into an agreement with a qualified buyer and request Commission consent to an assignment of permit or a transfer of control. Assuming the qualified buyer otherwise meets Commission requirements, the qualified buyer would then have two additional years in which to complete the construction of the new station. If it failed, the construction permit would be automatically forfeited with no further opportunity to extend it, absent the provisions applicable under Section 73.3598.

In order to be considered a qualified buyer, the party would either have at least 20% minority-group³ membership or make a firm commitment to provide specialized programming, aimed at minority-group members or in foreign languages, for at least 80% of the applicable station's weekly operating hours. Further, in order to prevent a party from quickly selling a station acquired under this program, there would be a mandatory five-year holding period following commencement of program test operations.⁴

Petitioners believe that this proposal should withstand scrutiny from the perspective of a minority preference. As indicated, a qualified buyer need not be minority-controlled, but need only have at least 20% minority ownership. Even a totally non-minority group could qualify so long as it commits to provide the program service for the requisite five-year mandatory holding period. Thus, the program is one that is not based on a pure racial classification.

³ The Commission has itself defined what a minority group member is. Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979, 980 n. 8 (1978).

⁴ The five-year holding period, which could include a right to sell a station to another qualified entity, corresponds with the unjust enrichment period for competitive bidding credits to designated entities. See Section 1.2111.

Petitioners recognize that the Supreme Court's decision in Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097 (1995), severely constrains the Commission in its actions. However, the proposed rules seek to meet the Adarand test of being "narrowly tailored measures that further compelling government interests." Id. at 2113. This is not an initial selection program aimed only at minorities. Nor, is it a program that only minorities qualify for. Rather, it is a program that applies if there is a significant minority presence or an intention to serve any of the many unmet minority group programming needs. Further, there is a significant holding period to ensure that the policy goals cannot be evaded, with a provision that a party which fails to comply loses its authorization.

The proposal presented herein is a narrowly tailored measure that is not based solely on racial classification. Rather, it is an effort to maintain the existence of otherwise expired permits by allowing parties that include minorities or will serve well-recognized and unmet needs through the extension of construction permits that would otherwise have been forfeited. Such a program should stand up to any equal protection scrutiny.

CONCLUSION

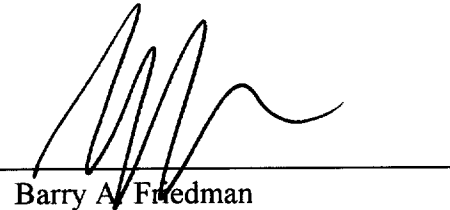
There is a compelling need for broadcast service by and for minority-group members. The Congress and the Courts have circumscribed the ability of the Commission to meet this need and industry conditions make improvements more difficult by the day. The instant proposal serves as a modest mechanism for improving the situation without impacting on Constitutional protections. Petitioners submit that the Commission should initiate a rulemaking proceeding that will adopt

this proposal on its own or as part of a reconsideration of the Streamlining Order.

Respectfully submitted,

**ENTRAVISION COMMUNICATIONS
COMPANY, L.L.C. AND PAUL A
ZEVNIK**

By: _____

A handwritten signature in black ink, appearing to read 'Barry A. Friedman', is written over a horizontal line.

Barry A. Friedman
Thompson Hine & Flory LLP
Suite 800
1920 N Street, NW
Washington, D.C. 20036
(202) 331-8800

Dated: March 9, 1999

PROPOSED CHANGES TO COMMISSION RULES

§ 73.3598 Period of Construction

Beginning on the date 60 days prior to the expiration of a construction permit and ending 30 days after its expiration, a permittee may file with the Commission a request to assign a permit or transfer control of a permittee to a Qualified Buyer. In the event that such an assignment or transfer of control is granted by the Commission, the Qualified Buyer shall have a period of two years from the consummation of the assignment or transfer of control in which to complete construction and file an application for license. As used herein, the term "Qualified Buyer" shall mean: (i) a party in which minority-group members own at least twenty percent of the equity and such ownership entitles them to participate in the management and control of the party, or (ii) a party that commits to serve the programming needs of minority-group members, including, but not limited to, through foreign language programming, for at least 80 percent of the weekly hours that the broadcast station is operating. Any party seeking to qualify as a Qualified Buyer shall commit to remain a Qualified Buyer, or to assign or transfer control to another Qualified Buyer, for a period of five years from commencing program test operations or face automatic forfeiture of its license.